IN THE SUPREME COURT OF IOWA
NO. 16-1658

CITY OF EAGLE GROVE, IOWA,
Plaintiff-Appellant,
vs.
CAHALAN INVESTMENTS, LLC, FIRST STATE BANK AND WRIGHT COUNTY TREASURER,
Defendants, Appellees,

CITY OF EAGLE GROVE, IOWA,
Plaintiff-Appellant,
vs.
CAHALAN INVESTMENTS, LLC, SECURITY SAVINGS BANK AND WRIGHT COUNTY TREASURER,
Defendants-Appellees.

APPEAL FROM IOWA DISTRICT COURT FOR WRIGHTCOUNTY
EQCV024134 and EQCV024135
THE HONORABLE CHRISTOPHER C. FOY,
DISTRICT COURT JUDGE

DEFENDANT-APPELLEE CAHALAN INVESTMENTS, LLC BRIEF AND REQUEST FOR ORAL ARGUMENT

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CERTIFICATE OF SERVICE

I certify that on February 8, 2017, I, the undersigned, did serve the within Defendant-Appellee Brief by U.S. Mail to the parties listed below, by enclosing one copy of same in an envelope addressed to each such party at the address listed, with postage fully paid, and by depositing said envelope in the United States Post Office depository in Fort Dodge, Iowa.

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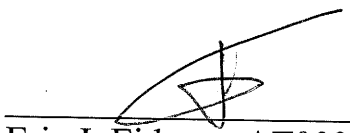

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CERTIFICATE OF FILING

I, Eric J. Eide, attorney for Appellee, do hereby certify that I electronically filed the foregoing Defendant-Appellee Brief with the Clerk of the Supreme Court, on February 8, 2017.

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STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

WHETHER THE DISTRICT COURT ERRED IN ITS DISMISSAL OF THE PETITIONS BY THE CITY OF EAGLE GROVE, IOWA FOR AN AWARD OF TITLE TO REAL ESTATE WHEN IT HELD THAT IOWA CODE SECTION 657A.10A WAS AN UNCONSTITUTIONAL TAKING OF PROPERTY IN VIOLATION OF THE FIFTH AND FOURTEEN AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 18, OF THE IOWA CONSTITUTION OF THE STATE OF IOWA.

ROUTING STATEMENT

The case should be retained by the Iowa Supreme Court as this case presents substantial constitutional questions as to the validity of a statute, specifically Iowa Code Section 657A.10A.

STATEMENT OF THE CASE

This is an appeal of the district court's dismissal of two petitions filed by the City of Eagle Grove, Iowa for an award of title to real estate pursuant to Iowa Code 657A.10A.

STATEMENT OF THE FACTS

Cahalan Investments, LLC is owned by Kevin and Rachel Cahalan, husband and wife. The company owns two rental properties in Eagle Grove, Iowa: one at 107 N. Blaine Street, and the other at 823 S. Commercial Street.

In August of 2014, the City of Eagle Grove (the *"City"*) passed Resolution 2014-25 approving an Agreement between the City and the Eagle Grove Community Development Corporation (*"Development Corp."*) "regarding the desire to utilize General Obligation Corporate Loan funds for the improvement of the City of Eagle Grove by the acquisition, repair, rehabilitation, or demolition of abandoned, dangerous, dilapidated, or blighted properties." (Defs. Exhibits D, e, App. pp. 59-60; 78-79). Under the terms of the Agreement, the Development Corp. was responsible to acquire, repair, rehabilitate, or demolish properties identified by the parties; while the City was responsible to assist the Development Corp., in good faith, in acquiring, repairing, rehabilitating, or demolishing said properties. The City agreed to provide up to $250,000 from the bond funds to be utilized by the City or the Development Corp. in

carrying out the purposes of the Agreement. (Agreement, ¶ 4, Ex. D, App. p. 60) (Transcript p. 39, lines 2-9).

The Defendant's two properties involved in this Appeal " [collectively the *"Subject Properties"*] i.e. - 107 N. Blaine Street (the *"Blaine Property"*) and 823 Commercial Street (the *"Commercial Property"*) were identified in the original group of properties to be targeted under the Agreement. (Transcript p. 25 lines 2-15).

Soon after entering into the Agreement with Development Corp., the City sent the Defendant a *Notice to Abate Nuisance* for each of the Subject Properties as follows:

- September 9, 2014 – 823 Commercial St. (Ex. f, App. p. 80).
- October 2, 2014 – 107 N. Blaine (Ex. G, App. p. 65).

The Notices were sent pursuant to the City's "Dangerous Buildings" Ordinance (i.e. – Chapter 145 of the Eagle Grove Municipal Code) [Ex. 45, App. pp. 27-28] [Ex. I, App. pp. 66-70]. Chapter 145 is a form of abatement ordinance that is commonly used by Iowa cities to deal with nuisance/dilapidated properties. It provides the owner the opportunity to remedy the condition; and failing that, authorizes the City to undertake the

abatement on its own and assess the costs thereof back against the property to be collected with the real estate taxes.

The Notices required the Defendant to take action within 14 days to abate the nuisance conditions at the Subject Properties by either "rehabilitation consistent with safe and habitable conditions over the remaining useful life of the property, or removal of the building." The Notices expressly apprised the Defendant that in the event it failed to abate or cause to be abated the nuisances, "the City will take such steps as are necessary to abate or cause to be abated the nuisance and the costs will be assessed against you as provided by law." This language is taken directly from the provisions of Sections 145.07 and 145.08 of the City Code.

At the time the Notices were sent to the Defendant, the City had not inspected either of the Subject Properties, or provided the Defendant with a list of the items necessary to bring the Properties into compliance with Chapter 145. (Transcript p. 71, lines 2-5).

On September 14, 2014, Mr. Jestin Wilmerth, a local general contractor, prepared inspections reports for the Subject Properties (Exs. g and E, App. pp. 81-88; 61-64). Those reports were not provided to the Defendant. (Transcript p. 234, lines 24-25, p. 235, line 1). Mr. Wilmerth

testified that both of the Subject Properties could be rehabilitated. (Transcript p. 112, lines 1-3). The Defendant's expert, Mr. Dennis Jordison, a retired municipal building inspector with over 30 years of experience, testified that neither of the Subject Properties was structurally unsafe (Transcript p. 349, lines 23-25 and p. 350, lines 1-8); and that both the Blaine Property and the Commercial Property could be rehabilitated. (Transcript p. 350, lines 19-20).

On October 31, 2014, attorney Dani Eisentrager, on behalf of the Development Corp., sent a letter to Mr. Cahalan offering to purchase the Subject Properties (Ex. I, j, App. pp. 66-70; 89-92). The offered price for each Property was $2,000.00 "for the purpose of demolishing it."

On November 12, 2014, in an e-mail to attorney Eisentrager, Mr. Cahalan made counteroffers of $20,000 for 823 S. Commercial and $15,000 for 107 N. Blaine. [Ex. J, App. p.71]. The Development Corp. did not consider the counter proposals. (Transcript p. 216, Lines 22-23).

On November 18th, Attorney Eisentrager sent the Defendant a letter confirming the scheduling of a hearing before the City Council "according to Chapter 145." The hearing before the Council was held on for December 1st. Mr. Cahalan appeared on behalf of the Defendant. In

anticipation of said hearing, the City's regular attorney (Brett D. Legvold) prepared a detailed memorandum for the City Council and Administrator outlining the process to be followed under Chapter 145. (Ex. L, App. pp. 72-75). The memorandum included a sample Resolution that described the nuisance conditions, gave the owners a time-certain to abate such conditions, and authorized the City, if necessary, to abate

The City Administrator testified that the City was still dealing with the Subject Properties under the provisions of Chapter 145 as of December 14, 2014. (Transcript p. 70, lines 10-13). However, the City elected not to follow the Chapter 145 procedure, and instead on December 29, 2014 the City (through attorney Eisentrager) filed Petitions against the Subject Properties under Iowa Code §657A.10(A).

PRESERVATION OF ERROR/SCOPE OF REVIEW

Appellee agrees with the Preservation of Error and Scope of Review stated on pages 7 and 8 of Appellants Proof Brief.

ARGUMENT

Iowa Code §657A.10A violates the U.S. and Iowa Constitutions because it allows a City to take title to real property without requiring the payment of just compensation.

1. **The Constitutional Background**

One of the truly bedrock principles of American jurisprudence is the sanctity of private property rights. This principle is constitutionally enshrined in the 5th Amendment of the U.S. Constitution which provides:

> "nor shall private property be taken for public use,
> without just compensation"

Thus, while the government may constitutionally "take" private property, it may do so only for a "public purpose", and only upon the payment of "just compensation" for the property.

The Iowa Constitution elaborates on the protection afforded citizens from governmental takings in Article I, Section 18, which provides:

> "private property shall not be taken or public use without just compensation first being made, or secured to be made to the owner thereof, as soon as the damages shall be assessed by a jury, who shall not take into consideration any advantages that may result to said owner on account of the improvement for which it is taken."

In order to meet the Constitutional strictures limiting the ability of government to take private property, a body of statutory and common procedural and substantive law has developed under the rubric of condemnation or eminent domain.

In Iowa, Chapter 6A of the Iowa Code spells out the limited circumstances in which a governmental body (or, in rare instances, a private party) may exercise the right of eminent domain to involuntarily acquire private property. Chapter 6A identifies a limited number of public purposes for which private property can, within the strictures of the Constitution, be taken through eminent domain. Cities are conferred the right to exercise eminent domain "for public purposes which are reasonable and necessary as an incident to the policies and duties conferred upon cities." Iowa Code §6A.4(6). Of special significance to this appeal is the fact that in 1996 the Iowa Legislature expressly provided that for purposes of said Section 6A.4(6), "a city may condemn a residential building found to be a public nuisance and take title to the property for the public purpose of disposing of the property under Section 364.7 by conveying the property to a private individual for rehabilitation or for demolition and construction of housing." [Iowa Code §364.12A]

Chapter 6B then sets forth in detail the procedure to be used in carrying out the right of eminent domain – which procedures are designed to provide the constitutionally required just compensation, as well as due process. (see U.S. Constitution Art. I §9 and Iowa Constitution Art. I §§9, 18.[1]

2. **The Takings Analysis**

In Bormann v. Board of Supervisors, in and for Kossuth County, 584 N.W.2d 309, 315 (Iowa 1998) the Iowa Supreme Court set forth a 3-step framework for a "takings" analysis:

a.) Is there a constitutionally protected private property interest at stake? Acquiring fee title under §657A.10A clearly involves a constitutionally-protected property right.

b.) Has this private property interest been "taken" by the government for public use?

The City's attempt to acquire fee title and thus full possessory rights to the Defendant's parcels, constitutes a "per se" taking under the standard

[1] The Fourteenth Amendment to the Federal Constitution prohibits a state from "depriving any person of life, liberty, or property without due process of law."
Article I, section 9 of the Iowa Constitution pertinently provides that "[n]o person shall be deprived of life, liberty, or property, without due process of law."

set forth in Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 112 S Ct. 2886, 120 L. Ed.2d 798 (1992).

c.) If the protected property interest has been taken, has just compensation been paid to the owner?

The City of Eagle Grove concedes that no compensation will be paid to the Defendant owner for either of the Subject Properties. As set forth below, the City manager and attorney both testified that the "policy" of the City (and the CDC) was not to pay any money for properties acquired under the Agreement.

3. **Whether the Subject Properties are nuisances or "abandoned" under §657A.10A does not obviate the Constitutional requirement that just compensation must be paid.**

The City argues that because the Subject Properties are nuisances, no takings analysis is required. This is a complete misconstruction of takings jurisprudence. With a "per se" taking as provided for under §657A.10A, just compensation must always be made – "without any further inquiry" into whether the state action substantially advances a legitimate state interest. Bormann, at p. 316.

The City of Eagle Grove completely fails to comprehend the import of the takings clause, as evidenced by the following from its Brief:

> "In the case at hand, the analysis of the district court focuses on the subjective value as presented by Cahalan Investments, LLC and the lack of any provision for compensation to Cahalan Investments, LLC by the City of Eagle Grove, Iowa as if this is simply a case of condemnation pursuant to eminent domain under Iowa Code Chapter 6A; however, this case now before this court is not based upon condemnation of private property in accordance with Iowa Chapter 6A. The City of Eagle Grove has no use for the property and does not intend to retain the property. The City of Eagle Grove has petitioned to obtain title to the property pursuant to Iowa Code 657A.10A as an alternative remedy to abate a nuisance within the City of Eagle Grove, Iowa. It is not disputed that the remedy requested would award title to the City and extinguish all property rights of the Defendant, Cahalan Investments, LLC; however, the primary distinction is that the taking of property in this instance is to alleviate a public nuisance as the current owner, Cahalan Investments, LLC has allowed the property to remain uninhabited and deteriorating failed for years and under its ownership both parcels of property have become public nuisances. The second distinction is that the City is not taking the property to a City for "public use". As evidence presented at trial demonstrated, the City had no use for the property and the costs of demolition of the dilapidated houses would exceed value of the lots. The award of title free and clear of liens provides the City with clear title so that after the City has abated the nuisance by removal of the abandoned building so that the vacant lot may be then be further conveyed by the City to return it private use. Without this process, these abandoned properties would continue in a dilapidated and abandoned state for an indefinite time." (Appellants Proof Brief, p. 9-10).

The constitutional shortcomings in the City's position are many. For one, the City apparently believes that because it is not taking the Properties for a public purpose, that it thus falls outside the protections afforded by the takings clause. However, if the City is not taking the property for a public purpose - then it cannot constitutionally take the property at all, under any circumstances. The City believes that it can take title to nuisance properties outside the protections of the takings clause simply because the properties are nuisances. This is not the law.

Most telling is the City's claim that without the summary taking allowed under §657A.10A, "these abandoned properties would continue in a dilapidated and abandoned state for an indefinite period." (see Appellant's Proof Brief, p. 10, Lines 7-8). Yes, the Constitution requires a City to endure whatever period of time – far from indefinite – that it takes to either follow the eminent domain procedures under Iowa Code Chapters 6A and 6B; OR to follow the abatement procedures set forth in the city's "Dangerous Buildings" Ordinance.

4. **The evidence established that the Subject Properties had value.**

As determined by the trial Court, both of the Subject Properties have economic value.

"The Wright County Assessor places the value of the Blaine property at $15,700 and the value of the Commercial Property at $20,900. A private buyer had offered to purchase the Blaine Property for $10,000 shortly after the City commenced these actions. While the Court cannot say with any confidence what the actual fair market value of either property might be, it is certain that the Blaine Property and the Commercial Property each have more than nominal value." (Order, at p.5, lines 15-20, App. pp. 17-23).

The assessed value of 107 N. Blaine is $15,700 ($5,400 for the land, $10,300 for the dwelling) [Ex. M, App. pp. 76-77]. The assessed value of 823 S. Commercial is $20,900 ($8,900 for the land, $12,000 for the dwelling) [Ex. n, App. pp. 93-94]. The City Manager testified that the assessed values were not taken into consideration by the City because they "are usually not very accurate". (Transcript p. 76, line 18).

The City offered $2,000 for each of the Subject Properties. Although presented by the City as a "good faith effort" to resolve the outstanding concerns regarding the Subject Properties, its offers were anything but. There was no attempt to determine, yet alone offer, a just compensation to the Defendant for the Subject Properties. Both the attorney for the City and the City Manager admit that the offers made to

the Defendant for the Subject Properties were not serious. The City Administrator called the offer price a "nominal amount" to "just try to avoid a long drawn out legal battle." (Transcript p. 72, lines 17-24). The City Attorney admitted the $2,000.00 offers were tokens (Transcript p. 250, lines 4-7), and stated:

> "We were trying to be as reasonable as we could be. I'm going to be blunt. We knew Kevin wasn't going to do anything to rehabilitate the properties. And we wanted to avoid the time and expense of being here. And so we made nominal offers knowing that we have about $12,000 each to tear those properties down." (Transcript p. 197, lines 10-17.

However, at the time the offers were made, the City had no estimate for the cost of demolishing either of the Subject Properties. (Transcript p. 248, lines 12-22).

Despite the $250,000 in bond proceeds, Ms. Eisentrager testified that the Development Corp. didn't have "the kind of funds to pay that kind of money." (Transcript p. 216, lines 25, p. 217, line 1), and admitted that it is the policy of the Development Corp. *not to pay anything* for properties. (Transcript p. 250, lines 1-2 and p. 250, lines 18-20).

The City Administrator further admits that the offers for the Subject Properties were made without an appraisal. He justified the minimal offer on his personal feeling as to the value. (Transcript p. 76, lines 6-15). The attorney for the Development Corp. also testified it didn't bother with an appraisal. (Transcript p. 249, lines 9-10). The City Administrator acknowledged that the City could have condemned the Subject Properties. (Transcript p. 75, lines 10-12).

CONCLUSION

As found by the Trial Court, Iowa Code §657A.10A is unconstitutional because it allows a City to take title to private property without any provision for the payment of just compensation to the owner. §657A.10A is a legislative attempt to provide cities with a summary means to abate nuisance properties, which, however well-intentioned, makes an "end run" around the constitutional protections afforded private property – regardless of its condition. Under §657A.10A, the value of the property is irrelevant. It impliedly assumes that any property found to be "abandoned" under a set of statutory factors has no value, *a priori*. This assumption cannot withstand constitutional scrutiny.

As was the case in Bormann, the Legislature exceeded its authority in enacting §657A.10A. The inescapable conclusion is that §657A.10A effectuates a condemnation of private property without compensation, and is thus unconstitutional.

RELIEF REQUESTED

For the reasons set forth above, the Order of the District Court dismissing the above-captioned cases should be affirmed.

REQUEST FOR ORAL ARGUMENT

Appellees request permission to submit this matter with oral argument.

CERTIFICATE OF COMPLIANCE WITH TYPE VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This Brief complies with the type volume limitation of Iowa R. App. P. 6.903(1)(g)(1) or (2) because:

This Brief contains 3,701 words, excluding the parts of the Brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

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CERTIFICATE OF COST

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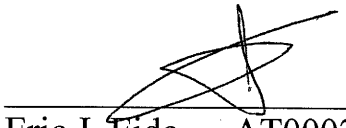

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